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IN THE SUPREME COURT OF THE STATE OF ARIZONA

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IN THE MATTER OF:

R-11-0033

PETITION TO AMEND ARIZONA E.R. 3.8,  
Rule 42, Rules of the Supreme Court

ARIZONA PROSECUTING ATTORNEYS'  
ADVISORY COUNCIL'S COMMENTS TO  
PETITION TO AMEND ARIZONA E.R. 3.8,  
RULE 42, RULES OF THE SUPREME COURT

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits  
comments to the Petition to Amend the E.R. 3.8, Rule 42, Rules of the Supreme Court.

Respectfully submitted this 21st day of May, 2012.

SHEILA POLK  
Chair, ARIZONA PROSECUTING  
ATTORNEYS' ADVISORY COUNCIL

ELIZABETH ORTIZ, APAAC



BY: \_\_\_\_\_  
SHEILA SULLIVAN POLK  
Chair, APAAC

1 The Arizona Prosecuting Attorneys' Advisory Council (APAAC) hereby submits its  
2 comments in opposition to R11-0033 Petition to Amend the E.R. 3.8, Rule 42, Supreme Court  
3 Rules. APAAC, a statutory council, is populated by representatives of the various criminal  
4 prosecution offices at every level of Arizona government: state, county and municipal. The content  
5 of this comment is a consensus of the member organizations. As such it may not include all the  
6 observations or concerns that may be held by any single member. Nevertheless, this comprehensive  
7 comment should be imputed the weight of the general prosecuting community, which is tasked with  
8 promoting justice while ensuring public safety throughout Arizona.  
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10 To be sure, within our imperfect but "model" criminal justice system, there are occasions  
11 when all the checks, balances and due process fail to properly screen out mistakes, thereby resulting  
12 in the anomalous conviction of one who may indeed be innocent. However, the proposed rule  
13 amendment does not address these situations. Prosecutors are already charged with a higher  
14 standard of seeking justice above all things, whether pre- or post-conviction. Moreover, Arizona  
15 law provides a panoply of post-conviction remedies for defendants who believe there is error in  
16 their convictions. Yet the Petitioners assert that the existing rules are insufficient to ensure  
17 maximum integrity of the system.  
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19 As the collective voice of prosecutors statewide, APAAC disagrees that the proposed  
20 change is either needed or that it will net the results Petitioners seek and therefore opposes this  
21 Petition. While we acknowledge and absolutely agree with the noble goal of fine-tuning the system  
22 to filter out innocent defendants, Petitioners have failed to make the case that the proposed rule  
23 amendment will actually accomplish this. First and foremost, there is simply no evidence that  
24 Arizona prosecutors fail to disclose post-conviction information that could have changed the  
25 outcome of a case. If the goal of post-conviction disclosure is already being accomplished, as  
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1 currently mandated by Arizona law, then adoption of the proposed rule does nothing to improve the  
2 system, but leads only to confusion and to possible discipline simply because one person interprets  
3 words differently than another.

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5 The genesis of this proposal is well stated in the Petition and in the February 25, 2010  
6 Arizona State Bar Criminal Practice and Procedure Committee Prosecution Section Report to the  
7 State Bar Ethics Committee (CPPC). APAAC hereby incorporates and adopts by reference the  
8 CPPC report. Suffice it to say that APAAC is moved to make this comment in an attempt to  
9 emphasize the concerns that have been articulated not only in Arizona but in many other  
10 jurisdictions. *See, e.g.* August 17, 2010 Los Angeles District Attorneys' Office, Opposition to  
11 Proposed Rule 3.8(d) of the California Rules of Professional Conduct.

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13 In addition to the concerns addressed in the CPPC report, APAAC has additional concerns  
14 with the proposed requirements. First, included in (g)(2)(ii) of the proposed language is the  
15 requirement that prosecutors "[u]ndertake further investigation, or make reasonable efforts to cause  
16 an investigation, to determine whether the defendant was convicted of an offense that the defendant  
17 did not commit." Prosecutors cannot be ordered to investigate. While the February 25, 2010 Report  
18 addresses several objections to imposing investigative duties on Arizona prosecutors, it does not  
19 specifically point out that such an order cannot be made by rule, as it is contrary to the constitutional  
20 separation of powers that underlie the exercise of prosecutorial discretion. By ordering prosecutors  
21 to investigate, the rule would be in conflict with these constitutional provisions. Moreover,  
22 prosecutors would be forced to choose between complying with the ethical duty to investigate,  
23 thereby acting outside the scope of prosecution duties and forfeiting their prosecutorial immunity, or  
24 violating the ethical rule and thereby subjecting themselves to attorney discipline.

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27 In addition, what is meant by "new, credible and material evidence"? How will a prosecutor  
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1 be able to make that determination when it is case specific, fact driven, circumstantial and perhaps a  
2 matter of perspective? For example, the recantation of a witness might be deemed new, credible and  
3 material by one individual but not by others where there are prior recordings, testimony,  
4 corroborating evidence and a motive to recant.  
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6 Another concern is the cross-jurisdictional requirement. Evidence may be obtained in a  
7 jurisdiction thousands of miles away. It is unclear if the mere discovery of evidence in another  
8 jurisdiction triggers a requirement for that jurisdiction's prosecutor to investigate.  
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10 It is further unclear what is intended for a prosecutor to "remedy" a situation. If a prosecutor  
11 discloses post-conviction information under existing requirements, Arizona law requires defendants  
12 to seek a remedy by filing for post-conviction relief. Would this burden now shift to the prosecutor  
13 under the proposed rule change?

14 APAAC's mission statement: "[e]mpowering Arizona's prosecutors to administer justice and  
15 contribute to public safety through training and advocacy" reflects our dedication not only to the  
16 overarching philosophical goals of the criminal justice system but to the daily machinations of  
17 bringing that philosophy to fruition. As with all systems, individual imperfections sometimes  
18 translate into error. Our current law provides mechanisms for addressing such error. While every  
19 system has room for improvement, it is vital that we all take care to ensure that any modifications are  
20 not only practical and amenable to implementation, but also that they are necessary to address a well-  
21 evidenced problem.  
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1 This proposed rule change seems to be a solution in need of a problem. The current situation  
2 in Arizona simply does not warrant this proposed change, particularly given the impediments to  
3 effective implementation.  
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5 Respectfully submitted this 21st day of May, 2012.

6 SHEILA SULLIVAN POLK  
7 Chair, ARIZONA PROSECUTING ATTORNEYS'  
8 ADVISORY COUNCIL

9 ELIZABETH ORTIZ, APAAC  
10 Executive Director

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12 BY: \_\_\_\_\_  
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14 Chair, APAAC  
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